

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
October 12, 2006 Session

**ABC PAINTING COMPANY v. WHITE OAKS APARTMENTS OF
HERMITAGE**

**Appeal from the Circuit Court for Davidson County
No. 04C-2175 Hamilton Gayden, Judge**

No. M2006-00280-COA-R3-CV - Filed on January 2, 2007

Painting company filed a claim against residential apartment complex for payment of invoices submitted for interior painting of the premises. Apartment complex counter-claimed, asserting that painting company did not perform the painting in a workmanlike manner. The trial court awarded painting company a portion of the damages sought in the complaint and some of the requested attorney's fees. Painting company appealed. We reverse in part and affirm in part.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed in Part,
Affirmed in Part**

WILLIAM B. CAIN, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL and FRANK G. CLEMENT, JR., JJ., joined.

J. Todd Faulkner, Nashville, Tennessee, for the appellant, ABC Painting Company.

Frank Grace, Jr., Eileen Burkhalter Smith, Nashville, Tennessee, for the appellee, White Oaks Apartments of Hermitage.

OPINION

On April 29, 2003, ABC Painting Company ("ABC") entered into a contract with White Oaks Apartments of Hermitage ("White Oaks") for the interior painting of residential apartments. The contract did not specify the total number of apartments which ABC would paint but rather provided a cost schedule and a promise that ABC would furnish the labor and materials to complete any requested work in accordance with the provided schedule. The contract additionally provided that ABC would complete the requested work in a workmanlike manner according to standard practices. White Oaks agreed to pay ABC upon the completion of any requested work and in the event that payment was not made in a timely matter, White Oaks agreed to pay all reasonable costs and expenses associated with a collection effort.

In a period from May 2003 until October 2003, ABC submitted completed work invoices in the amount of \$21,255.00 to White Oaks for the painting of approximately 110 apartments, however, none of the submitted invoices were paid by White Oaks. On July 28, 2004, ABC filed an action against White Oaks in an effort to secure payment of the invoices. On November 18, 2004, White Oaks filed a counter-claim asserting that ABC had not performed the painting in a workmanlike manner per the terms of the contract.

After a bench trial on December 14, 2005, the trial court entered an order awarding ABC \$17,000.00, which included \$13,500.00 for unpaid work and \$3,500.00 for attorney's fees. On January 25, 2006, ABC filed a motion to alter or amend or for a new trial, claiming that the judgment was against the weight of the evidence. The court denied the motion on March 6, 2006. ABC appeals asserting that the trial court erred in failing to award (1) the full amount of damages sought in the complaint; (2) prejudgment interest; and (3) the full amount of attorney's fees sought by ABC.

The standard of review in a bench trial is *de novo* upon the record with a presumption of correctness afforded to the trial court's finding of fact, unless the evidence preponderates against such findings. Tenn.R.App.P. 13(d); *Hudson v. Capps*, 651 S.W.2d 243, 247 (Tenn.Ct.App.1983). However, when the trial court fails to make any findings of fact, there is no presumption of correctness accorded to the trial court's decision and the appellate court must conduct its own independent review of the record to determine where the preponderance of the evidence lies. *Brooks v. Brooks*, 992 S.W.2d 403, 405 (Tenn.1999).

I. DAMAGES

ABC first argues that the trial court's decision to award \$13,500.00 in damages as opposed to the \$21,255.00 sought in the complaint was contrary to the preponderance of the evidence. Since the trial court failed to make any findings of fact, we must review the record to determine where the preponderance of the evidence lies. At trial, ABC produced completed work invoices totaling \$21,255.00, each of which was signed by a White Oaks employee. One of the co-owners of ABC, Mr. William Neely, testified that White Oaks never complained of substandard work and when White Oaks requested a touch-up, an ABC employee always completed the request. Although the White Oaks' leasing manager at the time, Whitney Shaw, admitted that all of ABC's work invoices were signed by a White Oaks employee, she complained that some of the apartments were completed in an unworkmanlike manner.

According to Ms. Shaw, some of the apartments were prepped but not painted, in other apartments the paint was applied unevenly or incompletely, and often times the paint colors did not match. Ms. Shaw claimed that five to ten calls were made to ABC about substandard work and three to four times out of ten, ABC would return and correct the work. Ms. Shaw also estimated that approximately seventy-five percent of the apartments painted by ABC were unacceptable and as a result, White Oaks had to hire another painter to complete the work and utilize in-house and outside vendors to clean up over spray left by ABC.

White Oaks was unable to substantiate Ms. Shaw's testimony with any documentary evidence. Ms. Shaw testified that White Oaks paid Mr. Don Hagan, owner of Hagan Painting and Drywall, \$3,520.00 to correct ABC's unacceptable work, however, the submitted invoice was dated April 1, 2003, which pre-dated the time in which ABC was working for White Oaks. In addition, Ms. Shaw was unable to testify to and White Oaks failed to record which specific apartments Mr. Hagan was employed to repair as a result of ABC's allegedly substandard work or how much Mr. Hagan was compensated for that work. Ms. Shaw could only estimate that forty to fifty of the 110 apartments painted by ABC were painted in a substandard manner.

Mr. Hagan testified that he saw some of the apartments that ABC painted and they appeared to have been "fluffed in and touched up", meaning that ABC did not paint the surfaces completely, rather only the areas with glaring imperfections. Mr. Hagan also testified that the paint that ABC used did not match the existing paint in the apartments and ABC only painted within a foot of the ceiling and a foot of the baseboards. According to Mr. Hagan, only three to four percent of the apartments which ABC painted were acceptable and as a result, he estimated that White Oaks paid him between \$8,000.00 and \$10,000.00 to correct ABC's work. However, Mr. Hagan could not testify as to which specific apartments White Oaks hired him to repair due to ABC's inferior workmanship nor could he produce any documentation specifying the exact amount of money which he was paid to correct ABC's work.

Although the party seeking damages has the burden of proving those damages, *Waggoner Motors, Inc. v. Waverly Church of Christ*, 159 S.W.3d 42, 57 (Tenn.Ct.App.2004), the burden is on the defendants who breached the contract to prove what amounts should be offset in mitigation of damages. *State ex rel. Chapdelaine v. Torrence*, 532 S.W.2d 542, 550 (Tenn.1976). And "[w]hile there is no mathematical formula for calculating damages, the proof of damages must be as certain as the nature of the case permits and must enable the trier of fact to make a fair and reasonable assessment of the claimed damages." *Waggoner Motors, Inc.*, 159 S.W.3d at 57 (internal citations omitted).

In this case, ABC provided signed invoices documenting each apartment they painted and the exact work which they performed. Conversely, White Oaks failed to present any invoices, payment stubs, or otherwise indicating with particularity the apartments which required additional work and how much that additional work cost. The White Oaks leasing agent first estimated that ABC completed twenty-five percent of the apartments in a workmanlike fashion. She later testified that ABC completed fifty-five to sixty-four percent of the apartments in a workmanlike manner. The painter that White Oaks hired to correct ABC's work estimated that only three to four percent of the apartments were painted in an acceptable manner. Furthermore, the White Oaks leasing agent admitted that she did not personally view every unit which ABC painted nor could she state with certainty that the monies paid to Mr. Hagan were in payment for correcting ABC's inferior work.

It is well settled that damages may not be based on speculation or conjecture. *Overstreet v. Shoney's, Inc.*, 4 S.W.3d 694, 703 (Tenn.Ct.App.1999). However, we have held that "uncertain or

speculative damages are prohibited only when the existence of damages is uncertain not when the amount of damage is uncertain” and that “[a]ll that an award for damages requires is proof of damages within a reasonable degree of certainty.” *Redbud Coop. Corp. v. Clayton*, 700 S.W.2d 551, 561 (Tenn.Ct.App.1985). This view has been sustained where the nature of the case prevents exact and accurate proof on the extent of the injury and the amount of damage. *Stevens v. Moore*, 139 S.W.2d 710, 719 (Tenn.1940).

The nature of this case did not prevent White Oaks from establishing the mitigation of damages with exact and accurate proof. White Oaks could have easily reviewed the apartments which ABC painted and documented which apartments they found unacceptable. White Oaks has the burden to prove the mitigation of damages with reasonable certainty and upon our review of the record, we find that the testimony in support of an offset was speculative and unsubstantiated by a preponderance of the evidence. Therefore, we find that the trial court’s judgment was contrary to the preponderance of the evidence and award ABC the entirety of damages sought in their complaint.

II. PRE-JUDGMENT INTEREST

ABC also contends that the trial court erred in failing to award prejudgment interest. The award of prejudgment interest is within the sound discretion of the trial court and the decision will not be disturbed on appeal absent a manifest and palpable abuse of discretion. *O’Leary v. Johnson*, 84 S.W.3d 584, 588 (Tenn.Ct.App.2002). Tennessee Code Annotated section 47-14-123 provides:

Prejudgment interest, i.e., interest as an element of, or in the nature of, damages, as permitted by the statutory and common laws of the state as of April 1, 1979, may be awarded by courts or juries in accordance with the principles of equity at any rate not in excess of a maximum effective rate of ten percent (10%) per annum.

Tenn.Code Ann. § 47-14-123.

It is well settled that the allowance of prejudgment interest is not a penalty imposed upon defendants but rather an element of damages to be allowed in accordance with the principles of equity. *Schoen v. J.C. Bradford & Co.*, 667 S.W.2d 97, 101-02 (Tenn.Ct.App.1984). “Simply stated, the court must decide whether the award of prejudgment interest is fair, given the particular circumstances of the case. In reaching an equitable decision, a court must keep in mind that the purpose of awarding the interest is to fully compensate a plaintiff for the loss of the use of funds to which he or she was legally entitled, not to penalize a defendant for wrongdoing.” *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 927 (Tenn.1998).

Here, ABC was legally entitled to \$21,255.00 for the painting of approximately 110 apartments. White Oaks owed ABC these monies since October 2003, therefore, ABC experienced a loss of the use of these funds for over three years. We find that under the circumstances, the principles of equity dictate that ABC be awarded prejudgment interest in order to fully compensate ABC for its loss.

III. ATTORNEY'S FEES

ABC finally argues that the trial court erred in refusing to award ABC the entirety of its attorney's fees. Tennessee has adopted the American rule of legal fees, requiring litigants to pay their own fees absent an exception. *Morrow v. Bobbitt*, 943 S.W.2d 384, 392 (Tenn.Ct.App.1996). One recognized exception is that attorney's fees may be recovered by a prevailing party when attorney's fees are provided for by statute or by contract between the parties. *Goings v. Aetna Cas. & Sur. Co.*, 491 S.W.2d 847 (Tenn.Ct.App.1972). Generally, however, "[i]n the absence of a statutory or contractual agreement between the parties, allowance of attorneys' fees as a part of damages recoverable is contrary to the public policy of the state." *John J. Heirigs Const. Co., Inc. v. Exide*, 709 S.W.2d 604, 609 (Tenn.Ct.App.1986). Where there are sufficient grounds for such awards, a trial court has wide discretion in its decision to award attorneys fees. *Garfinkel v. Garfinkel*, 945 S.W.2d 744, 748 (Tenn.Ct.App.1996).

In this case, the contract signed by the parties provided that White Oaks would pay the costs and expenses associated with a collection effort instituted against it as a result of a breach of the contract. The contract specifically stated in pertinent part:

In the event that payment is not made in a timely manner and it becomes necessary for ABC Painting to enforce payment, Customer agrees to pay all costs and expenses of any legal action or collection efforts instituted against Customers as a result of such breach by Customers, including but not limited to, reasonable attorneys fees incurred as a result of such breach.

ABC argues that because the contract provided that White Oaks would pay "all costs and expenses ... including but not limited to, reasonable attorneys fees", the trial court erred in failing to award ABC the entirety of its attorney's fees incurred in the present action. However, "[t]he 'determination of reasonable attorneys' fees and costs is necessarily a discretionary inquiry' by the Trial Court, to which the appellate courts will defer, absent an abuse of discretion." *Keith v. Howerton*, 165 S.W.3d 248, 250 (Tenn.Ct.App.2004) (quoting *Killingsworth v. Ted Russell Ford*, 104 S.W.3d 530, 534 (Tenn.Ct.App.2002)). And the reasonableness of an attorney's fee will depend upon the particular circumstances of the individual case. *White v. McBride*, 937 S.W.2d 796, 800 (Tenn.1996). The trial court determined that \$3,500.00 in attorney's fees was reasonable under the circumstances of this case and we cannot find that the trial court abused its discretion in reaching this decision.

The judgment of the trial court is affirmed in part and reversed in part. The costs of appeal are assessed to Appellee.

WILLIAM B. CAIN, JUDGE